

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

THOMAS J. HARTY

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DOCKET NO. 82-4

MEMORANDUM AND ORDER
DENYING GRIEVANT'S MOTION
FOR SUMMARY JUDGMENT

On May 18, 1982, Grievant filed a Memorandum of Law requesting the Vermont Labor Relations Board reconsider its March 8, 1982, Memorandum and Order Denying Grievant's Motion for Summary Judgment.

Grievant contends the dismissal of a State Police member for any reason may not be accomplished without resort to the hearing process provided for in 20 VSA §1880 and §1921. Since the requirements of §1880 and §1921 were not followed in this case, Grievant contends he is entitled to judgment and reinstatement as a matter of law.

20 VSA §1880 and §1921 provide that with the exception of a temporary suspension, no "disciplinary action" shall be taken against a State Police member without there first being a hearing on charges before either the district court or a panel of State Police members.

At dispute here is what constitutes "disciplinary action". The State contends a dismissal for performance reasons is not disciplinary action and, thus, the procedure of §1880 and 1921 does not have to be followed in such cases. The State contends Grievant was dismissed for performance reasons. Grievant maintains even if he was dismissed for performance reasons, that constitutes "disciplinary action" and the procedures of §1880 and 1921 had to be followed.

For State employees who are not State Police members, there is a distinction between disciplinary action and action taken for performance reasons. Disciplinary action is taken for an "offense" committed by an employee. Article 15 (1) of the Master Agreement between the State and Vermont State Employees' Association. An offense refers to misconduct by an employee. A dismissal for performance deficiencies results from no "offense" committed by the employee, but instead is caused by adherence to the merit system principle of separating classified employees "whose inadequate performance...cannot be corrected" 3 VSA §312(b)(14). Disciplinary action is imposed for misconduct, not non-performance. Grievance of Ruth Muzzy, 3 VLRB (1980). c.f. In re: Grievance of Dennis Murphy, ___ Vt. ___ (February 12, 1982).

However, State Police members are not in the classified service for purposes of job tenure. 3 VSA §311(b). Further, they are excluded from those provisions of Article XV relating to disciplinary action, being covered instead by the provisions of 20 VSA §1880 and 1921. The question remains whether a dismissal of a State Police member for performance reasons constitutes disciplinary action.

Grievant contends a review of legislative history indicates the Legislature intended the provisions of 20 VSA §1880 and 1921 to apply to all dismissals. Grievant relies on a report issued by the Committee to Inquire into the Organization, Structure and Administrative and Management Policies of the Department of Public Safety ("Costello Committee"). Grievant contends the report and the resultant legislation indicate the Legislature intended to give State Police officers the same tenure rights enjoyed by municipal police officers.

24 VSA §1932(a) provides whenever a municipal officer is charged with being "negligent and derelict in his official duty, or guilty of conduct unbecoming an officer", the officer is entitled to a hearing before the municipal legislative body or the district court.

The Costello Committee recommended the State Police enjoy the fundamental rights enjoyed by the municipal officers, and the House in 1980 passed H.738, which provided a State Police member charged with being "negligent or derelict in his official duties, or is guilty of conduct unbecoming an officer", was entitled to a hearing before a panel of three State Police officers or the district court. This language reflects an apparent House intent that hearings would not be limited to misconduct cases, but would embrace performance-related dismissals. However, the House bill did not become law. The bill eventually passed, Act No. 156, excluded the House language and instead provided "no disciplinary action" shall be taken without resort to the hearing process.

To us, this legislative history and resultant language indicates the Legislature intended the term "disciplinary action" be given the same meaning as it is for other State employees and, thus, not encompass performance-related dismissals. This is borne out by statutory language, the collective bargaining agreement and provisions of the Department of Public Safety Rules and Regulations.

20 VSA §1921(a)(2) provides the Department of Public Safety shall develop a performance review rating system to be applied "at least annually to measure the performance of each officer by his immediate supervisor, with provision for grievance" (emphasis added).

This provision for grievances over performance evaluations is crucial, since matters of disciplinary action are excluded from the State Police grievance procedure. 20 VSA §1880. Article 3 Section 2(c) of the 1981-82 Agreement between the State and VSEA for the State Police Unit. If the Legislature intended action taken to address performance deficiencies be considered disciplinary action, they would have not retained the provisions for grievance in §1921(a)(2).

The Department Rules and Regulations give effect to the legislative intent to distinguish between disciplinary action and actions taken to address performance deficiencies. Disciplinary action is defined in Article 1A, Section 13, of the Rules as "any action taken as discipline against a member by the Commissioner as a result of the member's commission of an act of misconduct or improper conduct..." The legal meaning of discipline is "correction, chastisement, punishment, penalty". (Black's Law Dictionary, 4th Ed., West Publishing Co., 1951). Acts of misconduct and improper conduct are identified elsewhere in the Rules. Article V of the Regulations, Disciplinary Procedures, details the procedures to be followed in the event of disciplinary action. Section One (d) of the article provides:

...nothing contained in this article is to be construed as interfering with the right of supervisors to take appropriate administrative actions with respect to members under their command.

Article 1A, Section Two, of the Regulations defines Administrative Action as:

...any supervisory action, other than a disciplinary action, taken with respect to a member by a commanding officer or other supervisor, including training, counselling, warning, or a combination thereof.

We believe performance evaluations and any resultant action taken as a result of evaluations, including dismissal, falls within this definition. They are not disciplinary actions, as they are not taken to punish or chastise State Police members for any acts of improper conduct or misconduct. They are supervisory actions, designed to evaluate and improve employee performance, and where inadequate performance is not improved, to dismiss employees.

The grievance procedure established by the parties for the State Police Unit brings certain grievances to the Board without court intervention. Article 3, Section 2(c) of the State Police Unit Agreement details the areas outside the scope of this grievance procedure:

...matters of discipline, disciplinary action, transfer, or suspension and those items specifically covered by statute, as well as any other matters which are not required subjects of bargaining under 3 VSA Chapter 27, Subchapter 1, §904 are excluded from the grievance procedure under this Article.

Since performance-related dismissals are not disciplinary actions and since the Legislature provided performance evaluations were appealable through the grievance procedure, we believe appeals of performance-related dismissals are subject to the grievance procedure. Dismissals of State Police members for performance dismissals will be handled the same way as it is for other State employees, with direct appeal to the Board and just cause having to be established.

In the case before us, it may well be a question whether Grievant was dismissed for performance reasons, or whether, in fact, the stated reasons were a subterfuge for disciplinary action. For example, Grievant cites to us criticisms of himself that may well be "charges" such as

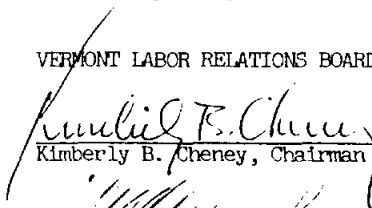
falsifying reports, and failure to obey orders. These "charges" may be simply a formulation of performance deficiencies in quasi-military language, or they may in fact be charges of misconduct. Without a full hearing, we cannot decide this issue. That is a determination we will have to make based on a full hearing. Thus, this case cannot be decided on a summary judgment motion. We realize the potential for abuse that exists in such a case, and place the burden on the State to prove the dismissal of Grievant was not, in fact, a disciplinary action.

For the foregoing reasons, it is hereby ORDERED:

Grievant's Motion for Summary Judgment is DISMISSED.*

Dated this 27th day of May, 1982, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Kimberly B. Cheney, Chairman


William G. Kemsley, Sr.

*Subsequent to the issuance of this Memorandum and Order, the Vermont Supreme Court handed down its decision in Grievance of Ruth Muzzy, Vt. ___ (July 15, 1982), reversing the order of the Board. In construing the contract, the Court rejected the Board's distinction between dismissals for misconduct and dismissals for nonperformance. The Court was unable to justify, based on the Contract, the Board's conclusion that a performance dismissal was not disciplinary. While the Muzzy case is not dispositive of the issue in Harty, since the Board is required to interpret the statute, not the Contract, the Board, on July 30, 1982, reversed this May 27, 1982, Memorandum and Order in Harty and granted Grievant's Motion for Summary Judgment. The Board stated that while they still believed that a dismissal based on poor performance is not a disciplinary matter, the Court's opinion in Muzzy was a strong indication that the Court would find that the statutory use of the word "discipline" contemplates all dismissals, both for nonperformance and misconduct. The Board's order thus permitted this important issue to go directly to the Supreme Court for review. Harty resigned immediately after the Board's order, mooting any appeal.